In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1627

JACKSON COUNTY, MISSOURI, KANSAS CITY, MISSOURI, AND THE OFFICE OF PUBLIC COUNSEL OF THE STATE OF MISSOURI,

Petitioners,

vs.

THE PUBLIC SERVICE COMMISSION OF MISSOURI AND MISSOURI PUBLIC SERVICE COMPANY,

Respondents.

RESPONDENT MISSOURI PUBLIC SERVICE COMMISSION'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

LELAND B. CURTIS
Commission Counsel

PAUL W. PHILLIPS
Senior Counsel

THOMAS A. HUGHES
Senior Counsel

P. O. Box 360
Jefferson City, Missouri 65101

Attorneys for Respondent Missouri Public Service Commission

E. L. Mendenhall, Inc., 926 Cherry St., Kansas City, Mo. 64106, 816-421-3030

TABLE OF CONTENTS

Statement of the Case 1

Jurisdiction 4

Reasons the Writ Should Not Be Granted—

I. Important Constitutional Issues Should Not Be Decided Devoid of Factual Content 7

II. This Case Is Not Justiciable Because Petitioners Have No Standing to Raise the Issue of Lack of Due Process 8

III. All That Petitioners Seek Is an "Advisory Opinion" 9

IV. If There Is a Defect in the Statutory Scheme Governing the Missouri Public Service Commission, the Issue Surrounding It Is Not Sufficiently Drawn Into Focus Because Petitioners Have Raised Their Due Process Argument As an "Afterthought" .. 10

Conclusion 13

Table of Authorities

CASES

Air Pollution Variance Bd. v. *Western Alfalfa*, 416 U.S. 861 (1974) 5

Association of Data Processors Serv. Organizations v. *Camp*, 397 U.S. 150 7

Baker v. *Carr*, 369 U.S. 186 (1962) 10

Bell v. *Burson*, 402 U.S. 535 (1971) 7

Black v. *Cutter Laboratories*, 351 U.S. 292 (1956) 6

Delzer Construction Co. v. *United States*, 487 F.2d 908 (8th Cir. 1973) 8

Department of Motor Vehicles v. *Rios*, 410 U.S. 425 (1973) 5
Jennings v. *Mahoney*, 404 U.S. 25 (1971) 7
Kansas City v. *Webb*, 484 S.W.2d 817 (Mo. *en banc* 1972) 6
Linda R.S. v. *Richard D.*, 410 U.S. 614 (1973) 8
Local No. 8-6 v. *Missouri*, 361 U.S. 363 (1960) 10
Mental Hygiene Dept. of Cal. v. *Kirchner*, 380 U.S. 194 (1965) 5
Montana Consumer Counsel et al. v. *Montana Public Service Commission et al.*, 541 P.2d 770, 11 PUR4th 476 (1975) 12-13
Mullane v. *Central Hanover Bank & Trust Co.*, 339 U.S. 305 (1950) 9
Muskrat v. *United States*, 219 U.S. 346 (1911) 10
North Carolina v. *Rice*, 404 U.S. 244 (1971) 10
Office of Communication of the United Church of Christ et al. v. *FCC*, (C.A.D.C. 1966) 359 F.2d 994 7
Oregon v. *Hass*, 420 U.S. 714 (1975) 5
Schlesinger v. *Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) 8
Sierra Club v. *Morton*, 405 U.S. 727 (1972) 8, 10
State ex rel. Kansas City Transit, Inc. v. *Public Service Commission*, 406 S.W.2d 5 (Mo. Sup. Ct. *en banc* 1966) 11
State of California v. *Krivda*, 409 U.S. 33 (1972) .. 5
Super Tire Engineering Co. v. *McCorkle*, 416 U.S. 115 (1974) 10
Terre Haute Gas Corp. v. *Johnson*, (Ind. 1942) 45 N.E.2d 484 7
Warth v. *Seldin*, 422 U.S. 490, 45 L.Ed.2d 343, at 354 (1975) 8

CONSTITUTIONAL PROVISIONS AND STATUTES

Amendment XIV, Section 1, United States Constitution 6
Article I, Section 2, Constitution of Missouri 6
Section 386.500.2, RSMo (1969) 11
28 U.S.C. 1257(3) 4

OTHER

Sporleder, *Judicial Review of Orders and Decisions of the Missouri Public Service Commission*, 28 J. of Mo. Bar 376 (1972) 12

In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1627

JACKSON COUNTY, MISSOURI, KANSAS CITY, MISSOURI, AND THE OFFICE OF PUBLIC COUNSEL OF THE STATE OF MISSOURI,

Petitioners,

vs.

THE PUBLIC SERVICE COMMISSION OF MISSOURI AND MISSOURI PUBLIC SERVICE COMPANY,

Respondents.

RESPONDENT MISSOURI PUBLIC SERVICE COMMISSION'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

STATEMENT OF THE CASE.

This Respondent finds Petitioner's Statement of the Case so lacking in a fair recitation of pertinent events bearing on due process as to be misleading in its overall effect. Respondent has no choice but to correct and supplement Petitioner's Statement of the Case with a short chronology of events leading up to the issuance of the Commission's decision.

On August 5, 1974, Missouri Public Service Company, Kansas City, Missouri ("the Company"), submitted to the Missouri Public Service Commission ("Commission") revised tariffs designed to increase rates for electric service provided to customers in the Missouri service area of the Company. The rates were designed to increase net annual revenues to the Company by approximately $10,350,000.

By order dated September 3, 1974, the Commission suspended the effective date of those rates until January 2, 1975. This order was served by first class U.S. Mail upon each of the named Petitioners in this action in addition to the Mayor of each municipality in the Company's service area (a total of 133 cities).

By order of September 26, 1975, the Commission scheduled dates for filing of prepared testimony by Staff, Intervenors, and the Company, and set dates for prehearing conferences and cross-examination of witnesses. Petitioners Jackson County and Kansas City filed timely Motions to Intervene which were allowed. This order invited "any potential proper party" to "appear" at the prehearing conference "to assist in the formulation of the issues in this matter." Furthermore, "any proper party desiring to intervene and participate herein shall, except for good cause shown, file its application to intervene on or before October 22, 1974."

The September 26, 1974 Order was served by first class U.S. Mail upon each of the named Petitioners in this action, and upon each of the following officials or entities in the Company's service area:

Presiding Judge of each county court;

Mayors of all cities (133);

Presidents of every Chamber of Commerce;

All State Senators (12);

All State Representatives (46);

Every known newspaper in the Company's service area.

Prehearing conferences were held in Jefferson City on November 13, 1974, and in Kansas City on December 17, 1974, for the purpose of allowing Petitioners herein, Staff, Company and other intervenors to discuss the development of issues to be presented to the Commission in this case.

On December 30, 1974, the Commission suspended the effective date of the tariffs for an additional period of six months to July 2, 1975.

On January 10, 1975, the Office of the Public Counsel filed an application to require notification by the Company to its residential customers of the Company's request for rate increase. On January 31, 1975, the Commission ordered the Company to furnish such notification and set out the form of notice. During the Company's February and March, 1975 billing cycles each residential customer's bill contained on the reverse side a notice of the proposed rate increase and an invitation to contact the Office of the Public Counsel should any customer wish to comment on the proposed rate increase.

The Commission scheduled and held local hearings for the purpose of receiving customer testimony within the Company's service area as follows: Nevada, Missouri on April 2; Blue Springs, Missouri on April 3; Grandview, Missouri on April 3; and Sedalia, Missouri on April 4. A total of fifty (50) customers appeared and testified on the record concerning the

proposed rate increase and any problems related to Company service.

A third prehearing conference commenced April 7, 1975 for the purpose of defining the issues to be presented to the Commission for hearing in this matter. That prehearing conference endured April 7, 8, 14 and 15 and resulted in a stipulation setting forth the issues and positions of all parties.

The main hearing commenced April 21st and consumed twelve (12) full hearing days. Seventeen (17) technical and/or expert witnesses testified. A total of ninety (90) exhibits were introduced by the various parties. On June 13, 1975 the Commission issued its seventy (70) page Report and Order. The transcript consists of 2,975 typewritten pages. All parties filed written briefs and orally argued their causes.

On page four (4) of the Petition of Jackson County, et al., the Petitioners aver:

> "No notice of this filing was given or ordered by the PSC to any person affected by the change within the utility's service area, nor did the utility do so."

This statement is clearly not supported by the facts.

JURISDICTION

Petitioners seek a writ of certiorari to review a Missouri Supreme Court judgment. Petitioners claim jurisdiction under 28 U.S.C. Section 1257(3). Respectfully recognizing the great latitude of discretion which lies with the Court, Respondent submits that there is no jurisdiction in this case pursuant to 28 U.S.C. Section 1257(3).

The United States Supreme Court has expressed its reluctance to assume jurisdiction "of a case from a state court unless it is plain that a federal question is necessarily presented." *Mental Hygiene Dept. of Cal.* v. *Kirchner*, 380 U.S. 194, 197 (1965). See also *Air Pollution Variance Bd.* v. *Western Alfalfa*, 416 U.S. 861, fn. (7) and accompanying text at 866 (1974). *Department of Motor Vehicles* v. *Rios*, 410 U.S. 425 (1973). "Where arguably 'the judgment of the state court rests on two grounds, one involving a federal question and the other not' . . . we do not take the case." dissenting opinion *id.* at 428.

"Where we have been unable to say with certainty that the judgment rested solely on federal law grounds, we have refused to rule on the federal issue in the case; *the proper course is* then either *to dismiss the writ as improvidently granted* or to remand the case to the state court . . ." dissenting opinion in *Oregon* v. *Hass*, 420 U.S. 714, 727 (1975) (Emphasis added). *State of California* v. *Krivda*, 409 U.S. 33 (1972).

The amount of due process afforded petitioners in this case prior to an "effective date" for their proposed rates not only meets constitutional requirements, but probably exceeds notice and hearing provisions afforded the public in any other aspect of the law. This can be readily seen upon a perusal of the complete set of facts provided by Respondent. (*E.g.* order of the Commission issued January 31, 1975 requiring the Company to notify its customers on the reverse side of their monthly utility bill.)

The Missouri Supreme Court's discussion of due process, as well as Petitioner's contention of lack of it, is completely academic. It is "Obiter Dictum" in

the truest sense of the word. The Supreme Court of the United States "reviews judgments, not statements in opinions". *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956).

The judgment rendered by the Missouri Supreme Court in this case does not rest on that portion of the opinion dealing with due process. That could be deleted without any different effect on the outcome. This is because the Petitioners in this case were afforded the complete realm of due process with respect to notice and opportunity to be heard (as pointed out in the concurring opinion of Judge Bardgett).

Respondent suggests that all of Petitioners' contentions regarding a denial of equal protection are frivolous. They have cited no cases whatsoever in support of their contentions. The Missouri Supreme Court treated the equal protection argument with one swift blow, quickly pointing out a rational basis for any alleged discrimination. 532 S.W.2d at 32-33. The dissent by Chief Justice Seiler may appear to give credence to Petitioner's Equal Protection argument, however, the only case cited, *Kansas City* v. *Webb*, 484 S.W.2d 817 (Mo. *en banc* 1972), clearly rests upon the equal rights and opportunities clause of Article I, §2 of the Missouri Constitution. *Id.* at 826. This case does not even come close to presenting an equal protection issue based on Section 1, Amendment XIV of the U.S. Constitution.

REASONS THE WRIT SHOULD NOT BE GRANTED

I. Important Constitutional Issues Should Not Be Decided Devoid of Factual Content.

Petitioners state that the consuming public has standing to challenge administrative actions (Petition p. 15). Petitioners cite *Association of Data Processors Serv. Organizations* v. *Camp*, 397 U.S. 150; *Office of Communication of the United Church of Christ et el.* v. *FCC*, (C.A.D.C. 1966) 359 F.2d 994; *Terre Haute Gas Corp.* v. *Johnson*, (Ind. 1942) 45 N.E.2d 484.

While it is true that the consuming public does have standing to challenge actions by a governmental agency which deprives them of due process, there is nothing here to challenge., There is no action here depriving anyone of due process. Whether or not this statutory scheme affords procedural due process on its face is not a question properly presented by this case. *Jennings* v. *Mahoney*, 404 U.S. 25 (1971). In *Mahoney* this Court pointed out that the statutory scheme for suspension of drivers' licenses was clearly questionable constitutionally in view of the due process requirements laid out by *Bell* v. *Burson*, 402 U.S. 535 (1971). Nevertheless the actions of the lower courts were sustained because this particular appellant was afforded some due process in the nature of a hearing at which he could present evidence and cross-examine adverse witnesses before suspension of his license. *Id.* at 26-27.

> "To examine [Petitioners'] due process contentions on the present record, however, would produce the result deplored by the Supreme Court in *DuBois* v. *Clark*, 389 U.S. 309, 88 S.Ct. 450, 19 L.Ed.2d

546 (1967) and 'the effect would be that important and difficult constitutional issues would be decided devoid of factual content' . . ." *Delzer Construction Co.* v. *United States*, 487 F.2d 908, 909-910 (8th Cir. 1973).

II. This Case Is Not Justiciable Because Petitioners Have No Standing to Raise the Issue of Lack of Due Process.

Petitioners have not presented a justiciable case. More specifically petitioners have not made out a "case or controversy" between themselves and Respondents within the meaning of Article III of the Federal Constitution. More specifically petitioners are not able to get beyond the threshold question of standing; i.e., "whether . . . [petitioners have] . . . 'alleged such a personal stake in the outcome of the controversy' to warrant *his* invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf". *Warth* v. *Seldin*, 422 U.S. 490, 45 L.Ed.2d 343, at 354 (1975).

Petitioners in this case have not been injured in any manner whatsoever. The judicial power of Article III exists only to redress or protect against injury to the party seeking relief. A fortiori, jurisdiction of the Supreme Court can be invoked only when the petitioner himself has suffered threatened or actual injury resulting from the allegedly illegal action. *Warth* v. *Seldin*, 422 U.S. 490, 45 L.Ed.2d 343 (1975). *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 (1973); *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 218-219 (1974); *Sierra Club* v. *Morton*, 405 U.S. 727, 733 (1972).

In this case Petitioners allege a denial of due process, however as the facts point out, all interested parties in this case were given more than adequate notice. There is no doubt that a notice printed on a monthly bill is "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action". *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 305, 314-315 (1950).

It must be remembered that *at no time did any proposed rates go into effect until after extensive hearings following detailed notice to all the parties interested.*

III. All That Petitioners Seek Is an "Advisory Opinion."

What Petitioners seek in this case is an "advisory opinion" pertaining to the possibility that the Commission may in some case allow a filed tariff to go into effect without a notice of such tariff filing. The following factors must be kept in mind:

1. The reason Judge Bardgett concurs instead of dissents in this case is because there was notice and opportunity to be heard extended to all interested parties.

2. The rights of the Petitioners in this case cannot be affected by any finding relating to due process. This is because they were afforded the complete realm of due process.

3. Since Petitioners were not denied any due process rights, there is no assurance of a "concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends

for illumination of difficult constitutional questions". *Baker* v. *Carr*, 369 U.S. 186, 204 (1962).

Clearly the judicial power of the United States Supreme Court extends only to actual controversies arising between adverse litigants. Judicial power does not extend to the rendering of "advisory opinions". *Muskrat* v. *United States*, 219 U.S. 346 (1911). *Sierra Club* v. *Morton*, 405 U.S. 727, fn. (3) at 732 (1972).

The Supreme Court is "impotent 'to decide questions that cannot affect the rights of litigants in the case before them' ". Dissenting opinion in *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 127 (1974). "[T]he duty of this Court 'is to decide actual controversies . . . not to give opinions upon . . . abstract propositions . . .' " *Local No. 8-6* v. *Missouri*, 361 U.S. 363, 368 (1960). See also *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971).

IV. If There Is a Defect in the Statutory Scheme Governing the Missouri Public Service Commission, the Issue Surrounding It Is Not Sufficiently Drawn Into Focus Because Petitioners Have Raised Their Due Process Argument As an "Afterthought."

Petitioners in this case have leveled an attack on the Public Service Commission's rate making procedure. Before the Missouri Supreme Court and now in their petition for a writ of certiorari they contend a lack of sufficient notice. It is clear, however, that the only decision in their favor, that of Judge Moore in Circuit Court of Jackson County, Missouri rests on nonconstitutional grounds. To quote from the opinion reproduced in Petitioners' petition at page A6:

> Respondent exceeded its power in entering the challenged report and order prior to the expiration of the two years from December 24, 1973. Still another infirmity is urged . . . The exclusive procedures [to increase rates] are respondent's own motion or complaint of an interested party . . . The Report and order of respondent . . . is reversed for noncompliance with [this exclusive procedure].

The Missouri Supreme Court, en banc, reversed and remanded, approving of the "file and suspend" method of increasing rates as well as the "complaint" method.

It must be noted that the decision rendered by the Circuit Court was influenced to a great extent by the alleged "two year moratorium" and that its decision is one of statutory construction, to wit: Upon a proper reading of the statute, what are the permissible methods of initiating an increase-in-rates proceeding? The Circuit Court opinion *in no manner whatsoever* states or implies that the "file and suspend" method is unconstitutional. This is because petitioners here were afforded the complete realm of due process protections.

As a matter of fact, Petitioners' applications for rehearing before the Commission, were devoid of any assignment of error based on lack of sufficient notice afforded by the statutory scheme. Under a Missouri statute, Petitioners would be forbidden to ". . . rely on any ground not so set forth in said application [for rehearing]." Section 386.500.2, RSMo (1969). This includes constitutional grounds. *State ex rel. Kansas City Transit, Inc.* v. *Public Service Commission*, 406 S.W.2d 5, 7 (Mo. Sup. Ct. *en banc* 1966).

Respondents do not wish to suggest that the United States Supreme Court is bound by this statute forcing a waiver of grounds not set forth in an application for rehearing. At the time petitioners filed their applications for rehearing, apparently they did not consider any constitutional ramifications important enough to preserve for future appeal. This is relevant to illustrate that this case may not be a proper case to consider the alleged due process problems petitioners raise.

All parties practicing before the Public Service Commission[1] know the importance of setting forth all grounds on which an order is alleged to be "unlawful, unjust or unreasonable" in an application for rehearing, in order to preserve these grounds for review.

Petitioners are all experienced practitioners before the Commission and would have included an assignment of error in their petitions for rehearing if there had been even a hint of a denial of due process in the proceedings. They did not. Yet Petitioners now would have this Court believe that grievous and prejudicial denials of due process occurred. As the Court can plainly see such was not the case.

The current attack on the statutory scheme of the Missouri Public Service Commission is devoid of factual content. Whatever defect, if any, there is in the statutory scheme is not sufficiently drawn into focus by this "after-thought" of Petitioners. See *Montana Consumer Counsel et al.* v. *Montana Public Service Com-*

1. Sporleder, *Judicial Review of Orders and Decisions of the Missouri Public Service Commission*, 28 J. of Mo. Bar 376 at 379 (1972).

mission et al., 541 P.2d 770, 11 P.U.R.4th 476 at 483 (1975) wherein it is stated:

> [Insufficiency of Notice] is not a bona fide issue on appeal. Consumer counsel appeared as a representative of the consuming public, participated in all proceedings before the commission, raised no issue on the sufficiency of the notice and cannot now raise this contention as an issue on appeal. . . .

CONCLUSION

For the reasons stated the petition for a writ of certiorari should be denied.

Respectfully submitted,

LELAND B. CURTIS
Commission Counsel

PAUL W. PHILLIPS
Senior Counsel

THOMAS A. HUGHES
Senior Counsel

P. O. Box 360
Jefferson City, Missouri 65101

Attorneys for Respondent Missouri Public Service Commission